

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>MOHAMMED HASM KHAIR</b>	:	DETERMINATION
		DTA NO. 818553
for Revision of a Determination or for Refund of Cigarette	:	
Tax under Article 20 of the Tax Law for the Period		
September 22, 1999.	:	

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Petitioner, Mohammed Hasn Khair, 153-32 Hillside Avenue, Jamaica, New York 11432, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period September 22, 1999.

A small claims hearing was held before Arthur Johnson, Presiding Officer, at the offices of the Division of Tax Appeals, 5 Penn Plaza, New York, New York on February 7, 2002 at 10:30 A.M. Petitioner appeared by Kenneth Brown, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Margaret Gagnon).

***ISSUE***

Whether petitioner was a person in possession of or had control of unstamped or unlawfully stamped cigarettes and tobacco products and, as such, is liable for the penalties imposed pursuant to Tax Law § 481(1)(b).

***FINDINGS OF FACT***

1. On September 22, 1999, investigators from the Alcohol, Cigarette and Tobacco Products Bureau of the Division of Taxation ("Division") conducted a regulatory retail inspection of Dhaka Market, Inc. located at 153-32 Hillside Avenue, Jamaica, New York. Petitioner, Mohammed Hasm Khair, the vice-president of the corporation was present at the time of the inspection. The investigators found 10 cartons of unstamped cigarettes mixed in with legally stamped cigarettes under the display counter. An additional 40 cartons of unstamped cigarettes and 20 pounds of untaxed tobacco products were discovered in the basement storage area of the store. The investigators also found that the corporation did not possess a New York State certificate of registration for 1999. The investigators seized the cigarettes and tobacco products, arrested petitioner and charged him with (1) possession for sale of unstamped cigarettes, (2) attempt to evade and defeat cigarette tax, and (3) being an unregistered distributor of tobacco products. At petitioner's arraignment in Queens County Court on September 23, 1999, all charges were adjourned in contemplation of dismissal.

2. On June 23, 2000, the Division issued a Notice of Determination to petitioner asserting that he was liable for a penalty of \$4,000.00 for the period ended September 22, 1999. The penalty was imposed pursuant to Tax Law § 481(1)(b) at the rate of \$100.00 per carton for each carton in excess of 10 cartons of unstamped cigarettes. Petitioner was also assessed, via a second Notice of Determination, a penalty of \$1,000.00 for the period ended September 22, 1999 for failure to have a certificate of registration. Petitioner did not file a petition with respect to this second assessment. The Division did not assert any penalty for the untaxed tobacco products.

***SUMMARY OF PETITIONER'S POSITION***

3. Petitioner purchased the store in 1996. He maintained that the market did not purchase or sell any cigarettes until it registered as a retail dealer in 2000. Petitioner argued that he had no knowledge of the cigarettes and tobacco products found in the basement. Petitioner admitted possession of the cigarettes under the counter but denied that they were for sale.

***CONCLUSIONS OF LAW***

A. Tax Law § 481(1)(b) provides that in addition to any other penalty imposed by Article 20, the Commissioner of Taxation and Finance may impose a penalty of not more than \$100.00 for each 200 cigarettes or fraction thereof in excess of 2,000 cigarettes in unstamped or unlawfully stamped packages in the possession or under the control of any person. The Commissioner of Taxation and Finance, in his discretion, may remit all or part of such penalty.

B. Petitioner was the owner and vice-president of Dhaka Market, Inc. and was directly involved in operation of the business. He was found in possession of 50 cartons of unstamped cigarettes and 20 pounds of untaxed tobacco products. The store had cigarettes openly displayed on a counter and cartons stored under the counter. Petitioner's testimony that the store did not sell cigarettes and that he had no knowledge of cigarettes and other tobacco products were stored in the basement was incredible. Whether petitioner sold cigarettes, however, is irrelevant. He was a person in possession of and had control of unstamped cigarettes. Accordingly, petitioner is liable for the penalty imposed under Tax Law § 481(1)(b). Petitioner presented no credible evidence that would warrant cancellation of any part of the penalties assessed by the Division.

C. The petition of Mohammed Hasm Khair is denied and the Notice of Determination issued June 23, 2000 is sustained.

DATED: Troy, New York  
April 11, 2002

/s/ Arthur Johnson  
PRESIDING OFFICER